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NO. 01-1711

Supreme Court, U.S.
JUN 28 2002
CLERK

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA
ex. rel. ANTHONY J. DUNLEAVY,
Petitioner,

v.

THE COUNTY OF DELAWARE, MARIANNE GRACE, EXECUTIVE DIRECTOR; THE COUNCIL OF THE COUNTY OF DELAWARE, WALLACE H. NUNN, CHAIR; MATTHEW HAYES, JR., ADMINISTRATOR FOR THE ESTATE OF MATTHEW J. HAYES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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REPLY TO THE BRIEF IN OPPOSITION

1. Respondents concede that the facts of the FCA claim in this case are irrelevant to the pure issues of law presented here. Brief in Opposition ("Br.Opp.") 2. Respondents thus acknowledge that this case is unblemished by record or procedural problems and is therefore a suitable vehicle for addressing the important questions presented.

2. Respondents concede that the Courts of Appeals are divided on the first Question Presented – whether municipal corporations are "persons" within the meaning of the FCA or are instead wholly immune from claims under the Act. Br.Opp. 3. Respondents further concede that the rift on this important question is widening: three Courts of Appeal have ruled, several more are poised to rule, and there are a dozen district court decisions, with courts going each way. Br.Opp. 5 n.4, 7. All of this activity comes in the wake of this Court's decision two Terms ago in *Vermont Agency v. United States ex rel. Stevens*, 529 U.S. 765 (2000). Several of the Courts of Appeals, including the court below, have misread *Stevens*. These court have made not just sovereign states, but also counties and cities, wholly immune from liability under the FCA. That issue warrants this Court's immediate attention.

3. Respondents urge the Court to delay resolution of this issue on the grounds that stripping the federal government of the remedies of the FCA is no big deal, as there are other means of protecting the United States Treasury from fraud by local governments. Br.Opp. 6. Respondents suggest that the federal government instead make use of audits. Br.Opp. 6. They opine that the FCA

is not an important or particularly "effective" means of redressing fraud on the public fisc. Br.Opp. 7.

Respondents are entitled to their own opinion, but their opinion on this issue is entitled to no weight. Congress has determined precisely the opposite: the FCA is the single most important weapon to combat fraud on the federal government, "intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side.'" S. Rep. No. 345, 99th Cong., 2nd Sess. 11 (1986) (citation omitted). Congress amended the FCA in 1986 to increase recoverable damages from double to treble with the specific purpose "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 345 at 1. *See also* H.R. Rep. No. 660, 99th Cong., 2nd Sess. 16 (1986). Furthermore, when Congress strengthened the FCA in 1986, it expressly noted its judgment that this statutory remedy applied to all "persons" who might defraud the Treasury, including "partnerships, associations, and corporations." S. Rep. No. 345 at 8.

Similarly, this Court has noted that "one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting . . . under the strong stimulus of personal ill will or the hope of gain." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n. 5 (1943).

Indeed, this Court has recognized the compelling need to resolve questions about the applicability of the

FCA with alacrity. In *Stevens*, the Court *sua sponte* raised the question of whether *qui tam* actions are permissible under Article III, even though that issue had not been previously litigated in the *Stevens* case itself. The issue had instead arisen in a case then pending in the Fifth Circuit and, rather than await a petition for writ of certiorari in the usual course, this Court added that Article III question about the FCA to the *Stevens* case already on the Court's docket. Similar solicitude is appropriate for the question presented here, which, if unreviewed, threatens the federal government's ability to protect the U.S. Treasury from frauds by cities and counties.

4. The remainder of Respondents' reasons for denying review consist of arguments on the merits. Unable to deny the sharp conflict among the Courts of Appeals, Respondents urge this Court to dismiss the closely reasoned decision of the Seventh Circuit in *United States ex rel. Chandler v. Cook County*, 277 F.3d 969 (7th Cir. 2002), as an "aberration" that, Respondents hope, will simply go away. Br.Opp. 3. That is hardly a sound policy of appellate review, especially when such an important federal statute is at stake. The United States Treasury and the taxpayers of the United States need the FCA and they need it available in every judicial circuit.

5. Virtually all of Respondents' defenses of the decision below were anticipated in the Petition, so only a few points require discussion here. First, the Petition argued that, in contrast to the Seventh Circuit in *Chandler*, the court below erred by failing to conduct the required statutory inquiry into whom Congress intended

to encompass within the statutory term "persons" in 31 U.S.C. § 3729(a). Petition 10-12. Remarkably, Respondents actually concede that the Third Circuit's decision did not address "the issue of whether the term 'person' includes municipalities." Br.Opp. 3. Since the meaning of the term "person" is the central issue of statutory interpretation that governs application of the FCA to cities and counties, Respondents thus inadvertently concede both the error of the court below and the need for review and reversal by this Court.

Second, Respondents actually contest this Court's own decisions on the meaning of the term "persons" in the FCA.[1] Respondents insist that the "liability provisions of the False Claims Act do not define the term 'persons' to include counties, municipalities or other political subdivisions." Br.Opp. 13. They further contend that "the term 'person' was not well settled so as to include municipalities in its definition when the False Claims Act was passed in 1863." Br. Opp. 14.

This flies in the face of *Stevens* and misrepresents this Court's decisions. *Stevens* explicitly reaffirmed that corporations "are presumptively covered by the term 'person.'" 529 U.S. at 782. *See* Petition 11-12. The Court stressed that nothing "cast[s] doubt upon the courts' assumption that §3729(a) extends to corporations." *Id.* at 782.

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[1]Despite Respondents' assertion to the contrary, Br.Opp. 9 n.6, municipal corporations are "persons" under the Program Fraud Civil Remedies Act, 31 U.S.C. § 3801 *et seq.*

When the FCA was enacted in 1863, cities "were treated as natural persons for virtually all purposes of constitutional and statutory analysis. . . . Local government units were regularly held to answer in damages for a wide range of statutory and constitutional violations." *Owen v. City of Independence*, 445 U.S. 622, 639 & n.19 (1980) (citing cases from 1860, *before* FCA was enacted). *See also City of Newport v. Fact Concerts*, 453 U.S. 247, 259 (1981) (citing cases from 1846, 1847, 1858, *before* FCA was enacted).

6. As this Court held in *Stevens*, the presumption that "persons" includes private and public corporations was not changed by the 1986 FCA amendments. 529 U.S. at 782-83 & n.12. In 1986, with the express understanding that the persons liable under the FCA included cities, Congress increased damages from double to treble, and thereby overrode any common-law presumption that cities are not subject to that damages remedy. Petition 19. The only interpretation left for Respondents is that Congress was sleepwalking.

7. Mr. Hayes misstates the holdings on the issue of his personal liability. The district court, citing the lack of allegations that Mr. Hayes personally benefitted from his actions, held that the complaint failed to state a claim against Mr. Hayes in his individual capacity. See A-41-42. The United States Court of Appeals for the Third Circuit noted "in passing" its agreement that "an employee of a local governmental unit is not subject to suit.... when the employee does not personally benefit from the transaction constituting a violation of the Act..." *See* A-4.

Respectfully submitted,

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